Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D5–22–984 OF 2007
RAMLY ALI J
14 FEBRUARY 2008

Arbitration — Agreement — Jurisdiction of court — Allegation of fraud — Building contract — Whether involved determination of issue of fraud — Whether defendant had right to refer dispute to court — Arbitration Act 1952 s 25(2)

Arbitration — Arbitration clause — Construction of — Whether building contract provided for application of the Arbitration Act 2005 or Arbitration Act 1952

Statutory Interpretation — Aids to construction — Intention of Parliament — Certain words provided for in Bahasa Malaysia text omitted from English text — English text being official text — Whether omissions made provisions in statute absurd or incomprehensible

Statutory Interpretation — Canons of construction — Specialia derogant generalibus — Interpretation of building contract

By an agreement dated 12 August 2002 ('the building contract'), the defendant agreed to perform certain works for the plaintiff. Clause 63 of the building contract dealt with the issue of arbitration. By a purported statutory notice dated 11 July 2007 under s 218 of the Companies Act 1965, the defendant demanded RM383,689.01 being an alleged debt due under the building contract. Thereafter, by this action commenced on 23 July 2007, the plaintiff sought, inter alia, a declaration that the purported statutory notice was wrongful and a permanent injunction restraining the defendant from presenting any winding up petition against it. The defendant filed a defence and counterclaim. Two weeks later, without taking any other step, the plaintiff applied for all proceedings pursuant to the counterclaim to be stayed pursuant to s 10 of the Arbitration Act 2005, contending that the counterclaim was in respect of disputes arising from the building contract, which was the subject of the arbitration agreement set out in cl 63 of the building contract. The defendant on the other hand, contended that the

present Arbitration Act 2005 ('2005 Act') was not applicable to the present case, but instead, the Arbitration Act 1952 ('1952 Act'). Hence the issue to be determined by the court in the present application was whether the 1952 Act or the 2005 Act applicable to the present case.

Held, dismissing the application with costs:

(1) Clause 63.5 of the arbitration agreement clearly showed that it was always the intention of the parties in the arbitration agreement that the applicable statute to regulate the matter pertaining to arbitration was the 1952 Act. Applying the primary function of the word 'deem' defined in *Barclays Bank Ltd v Inland Revenue Comrs* [1961] AC 509, the primary function of the words 'shall be deemed' in cl 63.5 of the arbitration agreement was to keep to the 1952 Act between the parties (see paras 17 & 20).

(2) Generally, when an agreement is entered between the parties (including arbitration agreement in the present case) and the law is altered during the pendency of the agreement, the rights of the parties would be decided according to the law as it existed when the agreement was entered, unless the new statute or law shows a clear intention to vary such rights. It was the intention and understanding of the parties at the time of entering into the arbitration agreement that when a dispute arise which involved a question of fraud between the parties, the defendant has the right to refer the dispute to the court as provided under s 25(2) of the 1952 Act. That is why cl 63.5 is constructed in such a way that 'a reference shall be deemed to be reference to arbitration within the meaning of the 1952 Act' (see paras 39 & 28).

(3) The charge of fraud was already pleaded in the counterclaim before the application for a stay was made by the plaintiff and was not trumped-up by the defendant after the application was made by the plaintiff. The court would not allow a stay of proceedings if a prima facie case of fraud was shown. On the facts, the defendant had shown a prima facie case of fraud in the pleadings (see para 42).

(4) In interpreting an Act of Parliament, the intention of the legislature must be taken into account. Once the intention is established and determined, then the court must give effect to that intention. Even though for this particular 2005 Act, the authoritative text was the English text, but for the purpose of interpreting the provisions of the Act and to determine the intention of Parliament and applying the purposive rule of interpretation, a reference must also be made to the Bahasa Malaysia text as well as the draft bill (DR 30/2005). If certain words, sentences or paragraphs were omitted in the English text of a

statute, the omission of which would make the provisions in the statute absurd or incomprehensible or did not truly manifest the intention of Parliament, the court must, refer to the Bahasa Malaysia text of the statute, and if the omitted words, sentences or paragraphs in the English text were present in the Bahasa Malaysia text, then the court must, supplement that words, sentences or paragraphs in interpreting the statute in the English text to be able to manifest the intention of Parliament (see paras 44 & 55).

(5) In an arbitration agreement, the consensus or intention of the parties is the paramount consideration in enforcing the said agreement or contract. In the present case, the parties intended that their arbitration agreement is to be governed by reference to the provisions of the 1952 Act, as stipulated in cl 63.5 and therefore, the law applicable between the plaintiff and the defendant is the 1952 Act, and not the 2005 Act. In the circumstances, the provisions of s 10(1) of the 2005 Act, under which the present application made by the plaintiff to stay the proceedings, was not applicable. Further, the relevant provisions to the matter was s 25(2) of the 1952 Act, which gave the right to the defendant to refer the dispute directly to the High Court provided the defendant could satisfy the court, prima facie, that the dispute involved an element of fraud (see paras 57–58).

(6) On the facts, the defendant had satisfied the court that the substantial matters at issue was the question of the perpetration of fraud or something in the nature of fraud on the part of the plaintiff, a matter which was outside the arbitrator's power to decide in light of s 25(2) of the 1952 Act and was not the type of dispute that should be properly referred to an arbitrator (see para 61).

[Bahasa Malaysia summary

Melalui perjanjian yang bertarikh 12 Ogos 2002 ('kontrak pembinaan'), defendan bersetuju melakukan kerja-kerja tertentu untuk plaintif. Klausa 63 kontrak pembinaan adalah berhubungan dengan isu timbangtara. Melalui notis statutori yang bertarikh 11 Julai 2007 di bawah s 218 Akta Syarikat 1965 defendan menuntut wang sejumlah RM383,689.01, iaitu hutang yang didakwa tertunggak di bawah kontrak pembinaan tersebut. Selepas itu, melalui tindakan ini yang dimulakan pada 23 Julai 2007, plaintif memohon, antara lain, satu deklarasi bahawa notis statutori tersebut adalah salah dan satu injunksi kekal menyekat defendan daripada memasukkan sebarang petisyen penggulungan terhadapnya. Defendan memfailkan pembelaan dan tuntutan balas. Dua minggu selepas itu, tanpa mengambil sebarang langkah yang lain, plaintif memohon supaya kesemua prosiding yang berkaitan dengan tuntutan balas tersebut digantung mengikut s 10 Akta Timbangtara

2005 dengan berhujah bahawa tuntutan balas tersebut adalah berhubung dengan pertikaian yang berbangkit daripada kontrak pembinaan tersebut, yang menjadi tajuk perjanjian timbangtara yang dinyatakan di dalam klausa 63 kontrak pembinaan tersebut. Defendan pula sebaliknya menegaskan bahawa Akta Timbangtara 2005 ('Akta 2005') tidak terpakai kepada kes ini, tetapi sebaliknya, Akta Timbangtara 1952 ('Akta 1952'). Isu yang perlu diputuskan oleh mahkamah dalam permohonan ini ialah sama ada Akta 1952 atau Akta 2005 yang terpakai dalam kes ini.

Diputuskan, menolak permohonan dengan kos:

(1) Klausa 63.5 perjanjian timbangtara jelas menunjukkan bahawa ia sentiasa menjadi hasrat pihak-pihak dalam perjanjian timbangtara bahawa statut yang terpakai untuk mengawal perkara berhubungan dengan timbangtara adalah Akta 1952. Mengaplikasi fungsi utama perkataan 'deem' yang ditakrifkan dalam *Barclays Bank Ltd v Inland Revenue Comrs* [1961] AC 509, fungsi utama perkataan-perkataan 'shall be deemed' di dalam klausa 63.5 perjanjian timbangtara adalah untuk menggunakan Akta 1952 di antara pihak-pihak (lihat perenggan 17 & 20).

(2) Secara amnya apabila perjanjian dimasuki di antara pihak-pihak (termasuk perjanjian timbangtara di dalam kes ini), dan undang-undang diubah semasa perjanjian tersebut masih digunakan, hak pihak-pihak akan diputuskan menurut undang-undang yang masih wujud semasa perjanjian tersebut ditandatangani, kecuali jika statut atau undang-undang baru tersebut menunjukkan niat yang jelas untuk mengubah hak-hak berkenaan. Ia adalah niat dan persefahaman di antara pihak-pihak semasa memasuki perjanjian timbangtara tersebut bahawa apabila timbul pertikaian yang melibatkan persoalan fraud di antara pihak-pihak, defendan mempunyai hak untuk merujuk pertikaian tersebut ke mahkamah seperti yang diperuntukkan di bawah s 25(2) Akta 1952 tersebut. Sebab itulah klausa 63.5 dibentuk sebegitu rupa supaya 'a reference shall be deemed to be a reference to arbitration within the meaning of the 1952 Act' (lihat perenggan 39 & 28).

(3) Tuduhan fraud telahpun diplid di dalam tuntutan balas sebelum permohonan untuk penggantungan dibuat oleh plaintif dan bukan direka oleh defendan selepas permohonan dibuat oleh plaintif. Mahkamah tidak akan membenarkan penggantungan prosiding jika kes frod prima facie telah ditunjukkan. Di atas fakta, defendan telah menunjukkan kes fraud prima facie di dalam plidingnya (lihat perenggan 42).

(4) Dalam mentafsir Akta Parlimen, hasrat Perundangan mesti diberi pertimbangan. Jika hasrat tersebut telah ditentukan dan ditetapkan, mahkamah mesti memberi perhatian kepada hasrat tersebut. Walaupun untuk Akta 2005 tersebut, teks rasmi adalah teks Bahasa Inggeris, tetapi untuk tujuan mentafsirkan peruntukan-peruntukan Akta dan untuk memastikan hasrat Parlimen dan memakai tafsiran 'purposive', rujukan mesti dibuat kepada teks Bahasa Malaysia dan juga draf rang undang-undang (DR 30/2005). Sekiranya perkataan-perkataan, ayat-ayat atau perenggan-perenggan tertentu tertinggal dalam teks Bahasa Inggeris sesuatu statut, peninggalan yang akan menjadikan peruntukan-peruntukan statut tersebut tidak munasabah atau tidak boleh difahami atau tidak memberi maksud kepada hasrat Parlimen, mahkamah mesti, merujuk kepada teks Bahasa Malaysia statut tersebut, dan sekiranya perkataan-perkataan, ayat-ayat atau perenggan-perenggan tertentu tertinggal dalam teks Bahasa Inggeris hadir dalam teks Bahasa Malaysia, maka mahkamah seharusnya, menambahkan perkataan-perkataan, ayat-ayat atau perenggan-perenggan dalam mentafsirkan statut dalam teks Bahasa Inggeris untuk membolehkan hasrat Parlimen dilaksanakan (lihat perenggan 44 & 55).

(5) Di dalam perjanjian timbangtara, persefahaman atau niat pihak-pihak adalah pertimbangan utama dalam menguatkuasakan perjanjian atau kontrak tersebut. Dalam kes ini, pihak-pihak menghasratkan bahawa perjanjian timbangtara mereka ditentukan oleh rujukan kepada peruntukan-peruntukan Akta 1952, seperti yang dinyatakan di dalam klausa 63.5 dan oleh yang demikian, undang-undang yang terpakai di antara plaintif dan defendan adalah Akta 1952 dan bukan Akta 2005. Dalam keadaan ini, peruntukan-peruntukan s 10(1) Akta 2005, di mana permohonan ini dibuat oleh plaintif untuk penggantungan prosiding tidak terpakai. Seterusnya, peruntukan-peruntukan yang relevan kepada perkara ini adalah s 25(2) Akta 1952, yang memberikan hak kepada defendan untuk merujuk pertikaian tersebut terus kepada Mahkamah Tinggi sekiranya defendan dapat memuaskan mahkamah secara prima facie bahawa pertikaian tersebut melibatkan unsur fraud (lihat perenggan 57–58).

(6) Atas fakta, defendan telah memuaskan mahkamah bahawa perkara-perkara penting yang dipersoalkan adalah satu persoalan tentang perlakuan fraud atau sesuatu yang bersifatkan fraud di pihak plaintif, satu perkara di luar kuasa penimbangtara untuk memutuskan mengikut s 25(2) Akta 1952 tersebut dan bukannya jenis pertikaian yang sepatutnya dirujuk kepada penimbangtara (lihat perenggan 61).]

Notes

For cases on arbitration clause, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1240–1241.

For cases on intention of Parliament, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1746–1754.

For cases on jurisdiction of court, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1204–1217.

For cases on *specialia derogant generalibus* generally, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1789–1820.

Cases referred to

Athlumney, Re [1898] 2 QB 547 (refd)

Barclays Bank Ltd v Inland Revenue Comrs [1961] AC 509 (folld)

Camilla Cotton Oil Co v Granadex SA & Anor [1976] 2 Lloyds Rep 10 (refd)

Ex parte Walton (1881) 17 Ch D 746 (folld)

Hutchinson v Jauncey [1950] 1 KB 574 (refd)

Keith Sellar v Lee Kwang [1980] 2 MLJ 191 (refd)

Lai Siew Wah Sdn Bhd v Ng Chin [1988] 1 MLJ 393 (refd)

Malaysia Building Society Bhd v Lim Kheng Kim & Ors [1988] 3 MLJ 175 (refd)

Malaysia Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors [1972] 1 MLJ 113 (refd)

Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors [1998] 4 MLJ 619 (refd)

Seaford Court Estates Ltd v Asher [1949] 2 All ER 155 (folld)

St Aubyn (LM) v AG (No 2) [1951] 2 All ER 473 (refd)

Tan Suan Choo v Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 (refd)

Tan Yian Han & Anor v Ang Chan Siong & Anor [1948–1949] MLJ 64 (refd)

Legislation referred to

Arbitration Act 1952 ss 25(2), 25(3)
Arbitration Act 2005 ss 10, 10(1), 10(1)(a), 10(1)(b), 51, 51(1), 51(2)
Companies Act 1965 s 218
Construction Industry Development Board Act 1994
Control of Rent Ordinance 1947 s 15
Employees Provident Fund Act 1991
Employment Act 1955
Employment (Restriction) Act 1968
Fees Act 1951
Increase of Rent (Restriction) Ordinance 1939 (repealed)
Industrial Relations Act 1967
Internal Security (Registration of Labour) Regulation 1960
Interpretation Acts 1948 and 1967 ss 17A, 30, 30(1)

T Baskaran (Zul Rafique & Partners) for the plaintiff.
Huzaini Hussin (Huzaini Hussin & Associates) for the defendant.

Ramly Ali J:

THE PRESENT APPLICATION

[1] The present application by the plaintiff (encl 11) dated 2 October 2007 is for a stay of proceedings on the defendant's counterclaim pursuant to s 10 of the Arbitration Act 2005.

THE PLAINTIFF'S CLAIM

[2] On 23 July 2007 the plaintiff filed the writ of summons and statement of claims dated 23 July 2007. The plaintiff's claims are for:

(a) a declaration that the defendant's demand against the plaintiff pursuant to the purported statutory notice pursuant to s 218 of the Companies Act 1965 dated 11 July 2007 for the sum of RM383,689.01 or any part thereof is wrongful and premature in law;

(b) a declaration that there is bona fide dispute on the sum demanded by the defendant under the aforesaid purported statutory notice;

(c) a declaration that the winding up proceedings threatened by the defendant through the aforesaid purported statutory notice is an abuse of process of this court;

(d) a permanent injunction restraining the defendant whether by themselves, their agents, servants, directors or otherwise howsoever from filing, presenting or proceeding with any winding up petition under the Companies Act 1965 to wind up the plaintiff for any debt alleged to be owing from the plaintiff to defendant or advertising any notice in respect of such a petition in any newspaper;

(e) general damages to be assessed;

(f) costs; and

(g) such further and/or other relief as this honorable court deems fit and proper to grant.

THE DEFENDANT'S DEFENCE AND COUNTERCLAIM

[3] On 21 September 2007 the defendant filed the statement of defence and counterclaim against the plaintiff dated 14 September 2007. The defendant's counterclaim are for:

(a) a declaration that the plaintiff is indebted and owes the defendant in the sum of RM383,689.01;

(b) a declaration that the interim certificate dated 8 September 2005 made by the plaintiff is invalid and void;

(c) a declaration that the deduction and withholding of the defendant's monies in the sum of RM1,596,646.41 by the plaintiff which are alleged as liquidated and ascertained damages is invalid and void;

(d) a declaration that the demand and acceptance of the performance bond bank guarantee monies in the sum of RM798,323.21 under the contract between the plaintiff and the defendant by the plaintiff is invalid and void;

(e) a declaration that this honorable court has the jurisdiction to make the declarations set out above;

(f) general damages to be assessed;

(g) costs; and

(h) such further and/or other relief as this honorable court deems fit and proper to grant.

FACTUAL BACKGROUND

[4] By an agreement in writing and dated 12 August 2002 ('the building contract'), the defendant agreed to perform certain works for the plaintiff. Clause 63 of the building contract deals with the issue of arbitration. The provisions are as follows:

63.1 ARBITRATION

(a) if any dispute or difference shall arise between the Employer and the Contractor, either during the performance or after completion of the Works, or after termination of the Contractor's employment, or breach of this Contract, as to:

(i) the contraction of this Contract; or

(ii) any matter or thing of whatsoever nature arising under this Contract; or

(iii) the withholding by the ER of any certificate to which the Contractor may claim to be entitled;

then such dispute or difference shall be referred to the ER for a decision.

(b) The ER decision which is to be in writing shall subject to sub-clause (e) hereof be binding on the parties until the completion of the Work and shall forthwith be given effect to by the Contractor who shall proceed with the Works with all due diligence whether or not notice of dissatisfaction is given by him.

(c) If the ER fails to give a decision for a period of forty-five (45) days after being requested to do so by the Contractor or if the Contractor be dissatisfied with any decision of the ER, then in any such case the Contractor may within forty-five (45) days after the expiration of forty-five (45) days after he had made his request to the ER, or forty-five (45) days after receiving the decision of the ER, as the case my be, require that such *dispute or difference be referred to arbitration and final decision of a person to be agreed between the parties to act as the Arbitrator.* The arbitration shall be held at the Regional Centre for Arbitration at Kuala Lumpur, using the facilities and assistance available at the center.

...

63.4 The Contractor hereby irrevocably submits to the exclusive jurisdiction of the courts of Malaysia in respect of the construction and the interpretation of the Contract Documents and the non exclusive jurisdiction of the courts of Malaysia for the enforcement of the arbitral awards judgments or matters of like nature.

63.5 In this Conditions, 'reference' shall be deemed to be reference to arbitration within the meaning of the Arbitration Act 1952 (Revised – 1972)

[5] By a purported statutory notice dated 11 July 2007, under s 218 of the Companies Act 1965, the defendant demanded RM383,689.01, being an alleged debt due under the building contract.

[6] Thereafter, by this action commenced on 23 July 2007 (encl 1), the plaintiff sought, inter alia, a declaration that the purported statutory notice was wrongful and a permanent injunction restraining the defendant from presenting any winding up petition against it.

[7] By an application dated 23 July 2007 (encl 3), the plaintiff applied for an interlocutory injunction to restrain the defendant from presenting a winding up petition, upon which an ex parte injunction order was made on 27 July 2007. Recently, on 9 January 2008, the injunction order was granted on inter parte basis.

[8] Then, by the defence and counterclaim dated 14 September 2007 (encl 9), the defendant made a counterclaim against the plaintiff.

[9] Two weeks later, without taking any other step, by the application herein dated 2 October 2007 (encl 11), the plaintiff applied for all

proceedings pursuant to the counterclaim to be stayed pursuant to s 10 of the Arbitration Act 2005.

THE PLAINTIFF'S POSITION

[10] The plaintiff's contentions are as follows:

(a) the counterclaim brought by the defendant is in respect of disputes arising from the building contract, which is the subject of the arbitration agreement set out in cl 63 of the building contract;

(b) the plaintiff has not taken any step in the proceedings pursuant to the counterclaim;

(c) the arbitration agreement set out in cl 63 of the building contract is valid, operative and capable of being performed; and

(d) there are disputes between the parties arising from the building contract, particulars whereof are set out in para 7 of the affidavit of Ms Yap affirmed on 2 October 2007 (encl 10).

[11] The plaintiff further contends that the application for stay of proceedings (encls 11) should be allowed on the ground that the requirement to stay proceedings under s 10 of the Arbitration Act 2005 is now mandatory, in light of the word 'shall' and the courts no longer have a general discretion, as before.

THE DEFENDANT'S POSITION

[12] The defendant on the other hand, contends that the present Arbitration Act 2005 is not applicable to the present case, but instead, the Arbitration Act 1952 applies.

ISSUE TO BE DETERMINED

[13] The precise issue to be determined by the court in the present application is which Arbitration Act is applicable in the present case: the Arbitration Act 1952 or the Arbitration Act 2005?

FINDINGS OF THE COURT

[14] The present Arbitration Act 2005 ('2005 Act') came into force on 15 March 2006. Pursuant to s 51(1) of the 2005 Act, the Arbitration Act 1952 ('1952 Act') is repealed. Section 10(1) of the 2005 Act provides:

A Court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds:

(a) that the agreement is null and void, inoperative or incapable of being performed; or

(b) that there is in fact no dispute between the parties with regard to the matters to be referred.

[15] The court agrees that from the reading of s 10(1) of the 2005 Act, it is mandatory for the court to stay proceedings and to refer the parties to arbitration, if the requirements under paras (a) and (b) are fulfilled. But in the present application, the court shall consider whether the 2005 Act (including s 10 itself) is actually applicable or not. If it is applicable, then the matter must be stayed and parties be referred to arbitration. If it is not applicable, then the court shall consider the matter pursuant to the 1952 Act.

[16] The relevant arbitration agreement (cl 63 of the building contract) was entered into between the parties on 12 August 2002, clearly before the 2005 Act came into force on 15 March 2006. At that time, the 1952 Act was still in force. Clause 63.5 of the arbitration agreement states that, 'In this Condition, 'reference' shall be deemed to be reference to arbitration within the meaning of the Arbitration Act 1952 (Revised 1972)'.

[17] These provisions clearly show that it was always the intention of the parties in the arbitration agreement as clearly manifested by cl 63.5 of the arbitration agreement that the applicable statute to regulate the matter pertaining to arbitration is the 1952 Act.

[18] Clause 63.5 of the said arbitration agreement specifically used the words 'shall be deemed'. According to *A Dictionary of Modern English Usage* (2nd Ed), Oxford University Press, the word 'deem' 'is an indispensable word in its legal sense of assuming something to be a fact which may or may not be one'. Applying the said definition in this case, the court is of the view that, a reference shall be made to the Arbitration Act 1952 which may or may not be the prevailing law applicable generally and/or may or may not be repealed at the time the reference or proceedings are taken by the parties.

[19] In *Barclays Bank Ltd v Inland Revenue Comrs* [1961] AC 509 (HL), Viscount Simonds, at p 523 said, 'I bear in mind what Lord Radcliffe said in *St Aubyn*'s case about the word 'deem' but nevertheless regards its primary

function as to bring in something which would otherwise be excluded'. Lord Radcliffe in *St Aubyn (LM) v AG (No 2)* [1951] 2 All ER 473, at p 498 said:

> The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.

[20] Applying the primary function of the word 'deem' defined by Viscount Simonds in *Barclays Bank*'s case, the court is of the view that, the primary function of the words 'shall be deemed' in cl 63.5 of the arbitration agreement between the parties here is to keep to the 1952 Act between the parties which would otherwise be excluded, because of the repeal, if the deeming clause is absent in the said arbitration agreement.

[21] The primary function of the word 'deemed' as to bring in something which would otherwise be excluded' as said by Viscount Simonds in *Barclays Bank* was adopted and followed in *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323 and *Malaysia Building Society Bhd v Lim Kheng Kim & Ors* [1988] 3 MLJ 175 in interpreting the statute and agreement.

[22] In *Ex parte Walton* (1881) 17 Ch D 746, James LJ, at p 756 explained the word 'deemed' as 'taken conclusively to be'. Applying the approach taken by James LJ, the court rules that pursuant to the said arbitration agreement, parties agreed that a reference shall be taken conclusively to be a reference to the 1952 Act.

[23] Even though cl 1.10 of the building contract provides that, 'all references to provisions of statutes, regulations, by-laws or any written law includes such provisions as amended, modified, re-certified or re-enacted', this clause is a general clause applicable to any other references to the provisions of statutes, regulations or by-laws, as the case may be, referred to in the contract, but not a reference that specifically referred in a specific clause where the statute, regulations or by laws, as the case may be, be deemed to be referred to in that specific clause.

[24] Clause 1.10 of the contract is applicable to the statutes referred to generally in the contract, for instance, the Employment Act 1955, Employment (Restriction) Act 1968, Employees Provident Fund Act 1991,

Industrial Relations Act 1967, Fees Act 1951, Construction Industry Development Board Act 1994, Internal Security (Registration of Labour) Regulation 1960 etc where the words 'deemed to be referred', or the like, is not used in reference to these statutes and/or regulation.

[25] Clause 63.5 of the arbitration agreement in the building contract used the word 'reference' specifically at the beginning of the paragraph, after the word 'In this condition', which is not used in the other reference to the other provisions of statutes referred to in the contract, with the purpose to exclude the general references provided under cl 1.10 of the contract. Furthermore the words 'shall be deemed' are only used in cl 63.5 of the arbitration agreement, and not used in any other reference to the other statutes.

[26] Clause 2 of the building contract which provides that the contract 'shall be governed by and construed in accordance with the laws of Malaysia as modified, re-certified or re-enacted', are also the general clause to the governing laws applicable to the contract which is excluded by the specific provision to the deeming clause for the reference to the Arbitration Act 1952 in cl 63 of the arbitration agreement.

[27] The cardinal principle on interpretation '*generalibus specialia derogant*' is verily applicable in interpreting the building contract. Where a special provision is made in a special clause (in this case cl 63.5 of the arbitration agreement), that special clause excludes the operation of a general clause (in this case cll 1.10 and 2) in the building contract. Furthermore, an arbitration agreement which form part of a contract is an independent agreement of the other terms of the contract.

[28] It was the intention and understanding of the parties at the time of entering into the arbitration agreement that when a dispute arise which involved a question of fraud between the parties, the defendant has the right to refer the dispute to the court as provided under s 25(2) of the 1952 Act. That is why cl 63.5 is constructed in such a way that 'a reference shall be deemed to be reference to arbitration within the meaning of the 1952 Act'.

[29] Section 25(2) of the 1952 Act provides as follows:

> Where any agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration, and a dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court shall, so far as may be necessary to enable that question be determine by the High Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement.

[30] The changes in the new 2005 Act is very substantial as it oust the court's jurisdiction to interfere when the parties agree in writing to refer the dispute to arbitration and there is no similar provision to s 25(2) of the 1952 Act in the new 2005 Act. The defendant shall have not entered into the arbitration agreement with the plaintiff if the defendant were aware that it cannot refer the dispute to the court as provided under s 25(2) of the 1952 Act.

[31] The court is of the view that it is the defendant's right and/or privilege pursuant to cl 63.5 of the said arbitration agreement to make a reference to the 1952 Act should any dispute arises between the defendant and the plaintiff under the building contract. And pursuant to the 1952 Act, in certain circumstances, such as the circumstances appeared in this present case where the element of fraud is in issues, the defendant has the right and/or privilege not to refer the dispute to an arbitrator and instead institute legal proceedings in the High Court to determine the dispute between the plaintiff and the defendant (see s 25(2) of the 1952 Act).

[32] The repeal of the 1952 Act in whole shall not affect any right or privilege acquired or accrued under the 1952 Act or affects any legal proceedings in respect of any such right or privilege and any such legal proceedings may be instituted or continued as if the Arbitration Act 2005 had not been made.

[33] In this respect s 30(1) of the Interpretation Acts 1948 and 1967 provides:

> The repeal of a written law in whole or in part shall not:
>
> (a) ...
>
> (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or
>
> (c) ...
>
> (d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made.

[34] Pursuant to cl 63.5 of the arbitration agreement reference of any dispute shall be deemed to be reference to arbitration within the meaning of the 1952 Act. Section 25(2) of the 1952 Act clearly envisages that when a

dispute arises involves an element of fraud, the party in question has the right to refer the matter to the High Court straight away, without having to go through the process of arbitration first.

[35] Therefore, since the right or privilege acquired by the defendant pursuant to the arbitration agreement to refer to the 1952 Act, and the right or privilege by the defendant pursuant to s 25(2) of the 1952 Act to refer the disputes to the High Court when the dispute involves the question of the perpetration of fraud on the part of the plaintiff, as clearly pleaded in the defendant's counterclaims dated 14 September 2007, any legal proceedings in respect of such right or privilege may be instituted or continued by the defendant as if the 2005 Act had not been made.

[36] The right or privilege acquired by the defendant is a specific right given by cl 63.5 of the arbitration agreement and s 25(2) of the 1952 Act on the happening of event specified in the s 25(2) of the 1952 Act that is the genuine allegation of fraud against the plaintiff.

[37] In *Keith Sellar v Lee Kwang* [1980] 2 MLJ 191 (FC) at p 193, Hashim Yeop A Sani J (sitting in the Federal Court) said:

> Generally however the right approach should be … that 'we must have regard to the trite maxim *omnis nova constitution futuris forman imponere debet non praeteritis*, that unless it is so expressed in the new law, a vested right is not taken away'.

In the present case there is no express provision in the new 2005 Act to take away the vested right acquired by the defendant under the arbitration agreement and the 1952 Act, to override the applicability s 30 of the Interpretation Acts 1948 and 1967.

[38] In *Tan Yian Han & Anor v Ang Chan Siong & Anor* [1948–1949] MLJ 64, the court held that the repeal of the Increase of Rent (Restriction) Ordinance 1939 (the repealed law) did not affect any right acquired by the landlord under that Ordinance and s 15 of the Control of Rent Ordinance 1947 (the repealing law) had no application in that case.

[39] Generally, when an agreement is entered between parties (including arbitration agreement in the present case) and the law is altered during the pendency of the agreement, the rights of the parties would be decided according to the law as it existed when the agreement was entered, unless the new statute or law shows a clear intention to vary such rights (see *Hutchinson v Jauncey* [1950] 1 KB 574; and *Maxwell's Interpretation of Statutes* (12th Ed).

[40] The 2005 Act is not meant to be applicable retrospectively. Section 51 of the 2005 Act is not an express provision to give a retrospective effect of the 2005 Act. There is no express provisions in the 2005 Act to give that effect. The defendant, by virtue of cl 63.5 of the arbitration agreement and s 25(2) of the 1952 Act, does have an 'acquired, accrued or incurred' right to refer his dispute to the High Court. The 2005 Act cannot be interpreted to take away such right from him unless there are clear express provisions to that effect. There is no such express provisions in the 2005 Act.

[41] The defendant's right is acquired, accrued or incurred upon the happening of an event specified in a statute (s 25(2) of the 1952 Act) that is the perpetration of fraud by the plaintiff (the particulars of which are specifically pleaded in the statement of defence and counterclaim) and the right to refer to the High Court for the determination on the issue of fraud. The defendant has also done an act towards availing itself of that right by referring the dispute to this court for determination. As such the right of the defendant under the 1952 Act is not an abstract right.

[42] The charge of fraud is already pleaded in the counterclaim before the application for a stay is made by the plaintiff. The defendant did not trumped-up the charge only after the application is made by the plaintiff. The principle in *Camilla Cotton Oil Co v Granadex SA & Anor* [1976] 2 Lloyds Rep 10; *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors* and *Lai Sew Wah Sdn Bhd v Ng Chin* [1988] 1 MLJ 393 is that the court will not allow a stay of proceeding if a prima facie case of fraud is shown. In this present case the defendant has shown a prima facie case of fraud in the pleadings.

[43] The judgment of RS Wright J in *Re Athlumney* [1898] 2 QB 547 on this issue is still applicable. In that case His Lordship held:

> Perhaps no rule of construction is more firmly established than this — that a retrospective operation is not to be given to a statute so as to impair an existing procedure, unless that effect cannot be avoided without doing violence to the language of the enactment (see also *Maxwell's Interpretation of Statutes* (12th Ed), p 216).

[44] In interpreting an Act of Parliament, the intention of the legislature must be taken into account. Once the intention is established and determined, then the court must give effect to that intention (see *Hutchinson v Jauncey* — per Evershed MP).

[45] In relation to this issue, the court shall refer to the provisions of s 51 of the 2005 Act which reads as follows:

> 51 Repeal and savings:
>
> (1) The Arbitration Act 1952 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 are repealed.
>
> (2) Where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted.
>
> (3) Nothing in this Act shall affect any proceedings relating to arbitration which have been commenced in any court before the coming into operation of this Act.

[46] The intention of Parliament is clearly manifested in clause 51(2) of the Arbitration Bill 2005 (DR 30/2005) [Rang Undang-Undang Timbangtara 2005 (DR 30/2005)] passed by the Parliament where it provides as follows:

> Jika perjanjian timbangtara dibuat atau prosiding timbangtara dimulakan sebelum permulaan kuat kuasa Akta ini, undang-undang yang mengawal perjanjian timbangtara dan prosiding timbangtara itu adalah undang-undang yang sepatutnya terpakai seolah-oleh Akta ini tidak diperbuat.

Translation

> Where the arbitration agreement was made or the arbitral proceedings were commenced before the coming into operation of this Act the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act has not been enacted.

[47] The intention of Parliament is also clearly manifested in the 2005 Act in its Bahasa Malaysia text, Akta Timbangtara 2005 which was assented by the Yang di-Pertuan Agong. Section 51(2) of the 2005 Act (in its Bahasa Malaysia text, Akta Timbangtara 2005) provides as follows:

> Jika perjanjian timbangtara dibuat atau prosiding timbangtara dimulakan sebelum permulaan kuat kuasa Akta ini, undang-undang yang mengawal perjanjian timbangtara dan prosiding timbang tara itu adalah undang-undang yang sepatutnya terpakai seolah-olah Akta ini tidak diperbuat.

[48] It was unfortunate that the draftsman, in translating the 2005 Act from its Bahasa Malaysia text, Akta Timbangtara 2005 to the 2005 Act in its English text, had, omitted the words 'jika perjanjian timbangtara

dibuat/where the arbitration agreement was made' at the beginning of the provision in s 51(2) of the 2005 Act in its English text. Section 51(2) of the Arbitration Act 2005 (English Text) provides as follows:

> Where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this act had not been enacted.

[49] Denning LJ in *Seaford Court Estates Ltd v Asher* [1949] 2 All ER 155 at p 156 said:

> It would certainly save the judges trouble if Acts of Parliament were drafted with divine presence and *perfect* clarity. In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set out to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the Legislature.

[50] Applying the above principle laid down by Denning LJ, the court has to look into the intention of Parliament in supplementing the written words in s 51(2) of the 2005 Act to remedy the defect made by the draftsman. The Arbitration Bill 2005 (DR 30/2005) [Rang Undang-Undang Timbangtara 2005 (DR 30/2005)] passed by Parliament is a clear intention of Parliament to exclude the applicability of the 2005 Act where 'the arbitration agreement was made or where the arbitral proceedings were commenced before the coming into operation of the 2005 Act'.

[51] This is also in line with the purposive approach provided in s 17A of the Interpretation Acts 1948 and 1967 where it provides:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[52] The inclusion of the words 'arbitral proceedings' in the second part of the paragraph after the comma (,) in s 51(2) of the 2005 Act is congruous and consistent, as the words 'arbitral proceedings' are included in the first part of the paragraph before the comma (,); whereas the inclusion of the words 'arbitration agreement' in the second part of the paragraph after the comma (,) is incongruous, absurd and inconsistent, as the words 'arbitration agreement' are not included in the first part of the paragraph before the

comma (,). Therefore, it must be understood and interpreted that the words 'arbitration agreement' should have been included in the first part of the paragraph, to give effect to its manifest intention in the second part of the paragraph that the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if the 2005 Act had not been enacted.

[53] The absurdity shows that the draftsman has omitted the words 'where the arbitration agreement was made' which if included correctly (as being done in the Bahasa Malaysia text) will clearly carry out the manifest intention of Parliament.

[54] In *Ex parte Walton* (1881) 17 Ch D 746, the court held that:

> A statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifest intention.

[55] Even though for this particular 2005 Act, the authoritative text is the English text, but for the purpose of interpreting the provisions of the Act and to determine the intention of Parliament and applying the purposive rule of interpretation, a reference must also be mode to the Bahasa Malaysia text as well as the Draft Bill (DR 30/2005), which was tabled and debated in both Houses of Parliament. If certain words, sentences or paragraphs are omitted in the English text of a statute, the omission of which will make the provisions in the statute absurd or incomprehensible or does not truly manifest the intention of Parliament, the court must, refer to the Bahasa Malaysia text of the statute, and if the omitted words, sentences or paragraphs in the English text are present in the Bahasa Malaysia text then the court must, supplement that words, sentences or paragraphs in interpreting the statute in the English text to be able to manifest the intention of Parliament.

[56] This is not a situation where there is a conflict or inconsistency between the wordings in the English text and the Bahasa Malaysia text but is a correlative by the Bahasa Malaysia text to the interpretation of the defective provision in the English text by applying the purposive approach.

[57] In law, an arbitration agreement, which forms the basis of an arbitration proceedings is an agreement or contract that originate from the consensus of the minds of all the parties to the said agreement. Therefore, the consensus or intention of the parties is the paramount consideration in enforcing the said agreement or contract. The arbitration statutes cannot impose on what the parties did not agree in the agreement. In the present case, the court is fully satisfied that, based on the above consideration, the

parties intended that their arbitration agreement is to be governed by reference to the provisions of the 1952 Act, as stipulated in cl 63.5. Based on the above considerations also, the court is satisfied that the law applicable between the plaintiff and the defendant is the 1952 Act, and not the 2005 Act. The court is also satisfied that the intention of Parliament in s 51(2) of the 2005 Act is to exclude the applicability of the 2005 Act to the parties where the arbitration agreement was made or where the arbitral proceedings were commenced before the coming into operation of the 2005 Act. The law governing the arbitration agreements and arbitral proceedings shall be the law which would have applied as if the 2005 Act had not been enacted. In this present case the 1952 Act shall be the law governing the arbitration agreement and the arbitral proceedings, since the arbitration agreement was made on 12 August 2002, before the coming into operation of the 2005 Act, which came into force on the 15 March 2006.

[58] That being the case, the provisions of s 10(1) of the 2005 Act under which the present application by the plaintiff to stay the present proceedings, is not applicable. There is no similar provisions in the 1952 Act. Since the applicable law is the 1952 Act, the relevant provisions to this matter is s 25(2) of the 1952 Act, which gives the right to the defendant to refer the dispute direct to the High Court provided the defendant can satisfy the Court prima facie that the dispute so arises involves an element of fraud (see the provisions of s 25(2) of the 1952 Act).

[59] The defendant's counterclaim is based on the perpetration of fraud on the part of the plaintiff. The defendant is seeking the court's determination that certain documents issued or certain acts taken by the plaintiff in deprivation of the defendant's right are void and invalid and request for damages because they were made in the perpetration of fraud on the part of the plaintiff. The particulars of fraud are sufficiently pleaded in the defendant's statement of defence and counterclaim dated 14 September 2007 (encl 9).

[60] The court finds that the issues for determination in the counterclaim are:

(a) whether the plaintiff through its agents, servants and/or representatives had fraudulently refused to issue the interim certificate dated 24 May 2004 and further refused to pay the defendant a sum of 383,689.01 admitted and certified by letters and certificate dated 5 May 2004, 7 July 2004 and 24 May 2004 and if it is not perpetrated by the fraud, whether that amount is due and payable by the plaintiff to the defendant;

(b) whether the plaintiff through its agents, servants and/or representative had fraudulently issued the interim certificate dated 8 September 2005 to deny the defendant's right for payment, and if so, whether it is void and invalid;

(c) whether the plaintiff through its agents, servants and/or representative had fraudulently deducted and withheld the defendant's monies in the sum of RM1,596,646.41 alleged as liquidated and ascertained damages, and if so, whether the deduction and with holding of the monies is void and invalid;

(d) whether the plaintiff through its agents, servants and/or representative had fraudulently demanded and accepted the performance bond bank guarantee of RM798,323.21, and if so, whether the demand and acceptance is void and invalid;

(e) whether this honorable court has the jurisdiction to make the declarations set out above;

(f) whether the defendant is entitled to general damages for the fraud perpetrated by the plaintiff through its agents, servants and/or representative.

[61] The defendant has satisfied the court that the substantial matters at issue is the question of the perpetration of fraud or something in the nature of fraud on the part of the plaintiff, a matter which is outside the arbitrator's power to decide in the light of s 25(2) of the 1952 Act. This is not the type of dispute that should be properly referred to an arbitrator.

[62] In *Lai Siew Wah Sdn Bhd v Ng Chin* [1988] 1 MLJ 393, the Supreme Court decided that once the court is satisfied that there is a bona fide allegation of fraud against the appellants, then the discretion given to the judge under s 25(3) of the Arbitration Act 1952 was indeed properly exercised.

[63] The court in *Malaysia Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors* [1972] 1 MLJ 113 has also made the same ruling ie 'that one of the substantial matters at issue was the question of the perpetration of fraud on the part of the first defendant, a matter which was outside the arbitrator's power to decide. Therefore, good ground existed as to why this particular dispute should not be submitted to an arbitrator'.

CONCLUSION

[64] Based on the above considerations, the court is satisfied that the defendant's counterclaim against the plaintiff need not be referred to an arbitrator as it involves a question of perpetration of fraud on the part of the plaintiff as clearly alleged by the defendant in its statement of defence and counterclaim. The dispute can directly be referred to the court pursuant to s 25(2) of the 1952 Act. On that basis, the court therefore refuses the application to stay proceedings as prayed by the plaintiff vide encl 11. The plaintiff's application is therefore dismissed with costs.

Application dismissed with costs.

Reported by Sally Kee